Appeal No. 02-3223 **Cir. Ct. No. 01-CV-113**

WISCONSIN COURT OF APPEALS
DISTRICT IV

ALEXANDER SPRINGER, A MINOR BY HIS PARENTS, DIANA SPRINGER AND JEFFREY SPRINGER, AND EMPLOYERS HEALTH INSURANCE,

PLAINTIFFS-RESPONDENTS,

WISCONSIN DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

PLAINTIFF,

V.

LAURA KRISTER, M.D., CHARLES W. SCHAUBERGER, M.D., THEODORE M. PECK, M.D., THOMAS G. FRISBY, M.D., TEDDY L. THOMPSON, M.D., AND GUNDERSEN CLINIC, LTD., GUNDERSEN LUTHERAN MEDICAL CENTER, GUNDERSEN CLINIC PROFESSIONAL LIABILITY INSURANCE PLAN, WISCONSIN HOSPITAL ASSOCIATION, WISCONSIN PATIENTS COMPENSATION FUND AND EVERETT A. BEGUIN, M.D.,

DEFENDANTS-APPELLANTS.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Deininger, P.J., Dykman and Higginbotham, JJ.

Pursuant to WIS. STAT. RULE 809.61 (2001-02),[1] this court certifies this appeal to the Wisconsin Supreme Court for review and determination of the following issues: (1) does the privilege against compelled expert testimony set forth in ***Burnett v. Alt***, 224 Wis. 2d 72, 589 N.W.2d 21 (1999), extend to a defendant physician in a medical malpractice case; and (2) does the privilege extend to non-party nurses employed by a defendant hospital in a medical malpractice action?

FACTS

The plaintiffs (collectively the Springers) allege medical malpractice in the treatment of Diana Springer before and during the delivery of her son, Alexander Springer. The defendants include Gunderson Clinic, Gunderson Lutheran Medical Center, and six physicians who treated Diana and Alexander.

During the discovery phase of the litigation, the Springers deposed the defendant physicians and several nurses employed by Gunderson Lutheran. The Springers posed questions that, all agree, called for expert opinion testimony pertaining to the treatment provided to Diana and Alexander. On advice of counsel, the witnesses refused to answer the questions calling for expert testimony, citing the privilege against compelled expert testimony set forth in ***Alt***.

The Springers moved to compel answers to those questions. After hearing arguments, the trial court held that the ***Alt*** privilege does not extend to the defendant physicians in this case, and that it also does not extend to non-party

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

nurses who would be parties but for the holding in ***Patients Compensation Fund v. Lutheran Hospital—La Crosse, Inc.***, 223 Wis. 2d 439, 588 N.W.2d 35 (1999).[2] We granted leave to file this appeal, and now certify it.

DISCUSSION

The supreme court recognized in ***Alt*** a witness's "broad qualified privilege" to refuse a litigant's request for expert testimony, absent compelling circumstances. ***Alt***, 224 Wis. 2d at 89. Several reasons arguably exist to infer that the court did not intend, however, to extend this privilege to parties in the litigation.

First, the facts are different in that the potential expert witness in ***Alt*** was a non-party employee of a defendant. ***Id***. at 80. Second, the court based the privilege, in substantial part, on the premise that a particular expert's opinion "is not irreplaceable. '[U]nlike factual testimony, expert testimony is not unique and a litigant will not be usually deprived of critical evidence if he cannot have the expert of his choice.'" ***Id***. at 89 (quoting ***Mason v. Robinson***, 340 N.W.2d 236, 242 (Iowa 1983)). Here, however, and in many other cases involving party-witnesses, it is the person's singular, and therefore irreplaceable, opinion that is sought.[3] Third, the supreme court noted the expert's possessory interest in his/her opinion, and required an adequate "plan of compensation" before a trial court

[2] The trial court applied the holding in ***Burnett v. Alt***, 224 Wis. 2d 72, 589 N.W.2d 21 (1999), however, to deny the motion to compel expert testimony from a non-party physician employee of Gunderson Clinic.

[3] For example, a party-witness whose conduct is alleged to have been negligent might be asked why he or she did or did not do certain things and whether the course chosen was consistent with the party-witness's understanding of proper care.

could order the privilege waived. ***Alt***, 224 Wis. 2d at 87-88. We question whether the supreme court envisioned compensation for compelled party-witnesses when an opposing party's questioning calls for opinions directly related to the party-witnesses' own conduct.

Fourth, the majority opinion did not fully address what the dissent described as the "difficult and inexact" task of distinguishing between "transaction" testimony and "expert" testimony elicited from a transactionally involved witness. *See* ***id***. at 109 (J. Bradley, dissenting). That task is before us now, as it will inevitably be any time a plaintiff seeks to depose an allegedly negligent party-witness who is qualified to give expert testimony. Finally, the ***Alt*** opinion does not expressly overrule ***Shurpit v. Brah***, 30 Wis. 2d 388, 141 N.W.2d 266 (1966), where the court held that a plaintiff could elicit expert opinion testimony from the defendant physician. ***Id***. at 397. One might argue, as the trial court here concluded, that ***Shurpit*** remains good law even after ***Alt***, but that conclusion is not a certain one.

Because ***Alt*** does not expressly resolve the present issue, because there are significant policy arguments on both sides, and because the issue will undoubtedly reoccur in other cases, we ask the supreme court to accept certification and clarify the extent of the privilege to not be compelled to state expert opinions. In doing so, the court may also wish to address the second issue in this case concerning the testimony of non-party but transactionally involved nurses who are employed by a party.